88-1248

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

ASSOCIATED MILK PRODUCERS, INC. and
MID-AMERICA DAIRYMEN, INC.,
Petitioners,

vs.

NATIONAL FARMERS' ORGANIZATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the established antitrust principle that the fact-finder may make a "just and reasonable estimate of the damage" caused by an antitrust violation:

(a) permits an antitrust plaintiff to prove the evidentiary basis for its damage estimate by less than "a preponderance of the evidence";

(b) allows an appellate court to shift to the defendant the burden of proof as to the measure of the plaintiff's damages; and

(c) permits an antitrust plaintiff to rely upon a damage theory that fails to exclude the effects of significant lawful competition?

2. Whether there is an "antitrust damages" exception to Rule 52(a) that permits an appellate court, based on its holding that the district court's findings rested on an "inappropriate legal standard" of proof, to review the record *de novo*, make its own witness credibility assessments and factual findings, and mandate an award of substantial damages, rather than remanding the case to the district court to reconsider its findings under the standard articulated by the appellate court?

This Petition presents only the foregoing two questions. Petitioners Associated Milk Producers, Inc. and Mid-America Dairymen, Inc. also adopt and incorporate by reference the two following questions presented in the companion Petition for Certiorari being separately filed by Central Milk Producers Cooperative:

1. Whether a national non-profit collective bargaining association of farmers which claims the right to engage in horizontal price-fixing on behalf of its members by reason of an antitrust exemption conferred by § 6 of the Clayton Act, 15 U.S.C. § 17, and the Capper-Volstead Act, 7 U.S.C. § 291, suffers "antitrust injury" when its future membership dues and marketing fees income is allegedly reduced by a conspiracy which interferes with the association's membership growth?

2. Whether proof of a properly defined relevant geographic market is necessary to show market power in a conspiracy to monopolize claim under § 2 of the Sherman Act or in a Rule of Reason conspiracy to restrain trade claim under § 1?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rules 21.1(b) and 28.1, Petitioners state that in addition to the three parties named in the caption of this Petition, Central Milk Producers Cooperative and Associated Reserve Standby Pool Cooperative, Inc.[1] were parties defendant in the proceedings below. Central Milk Producers Cooperative is separately filing a companion Petition for Certiorari with this Court.

Petitioner Associated Milk Producers, Inc. states that it has no parent, subsidiary or affiliated companies within the meaning of Rule 28.1.

Petitioner Mid-America Dairymen, Inc. states that it has no parent or subsidiary companies within the meaning of Rule 28.1, but is affiliated with the following companies: Hiland Dairy Co., Sinton Dairy Foods Co., Gillette Dairy of the Black Hills, Roberts Dairy, Inc., and Western Foods Processing, Inc.

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1. The Eighth Circuit affirmed the District Court's dismissal of NFO's claims against ARSPC. *NFO II*, 687 F.2d at 1191, 1207, App. F at 257, 289.

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2. Petitioners adopt and incorporate the Appendix accompanying the companion Petition for Certiorari being separately filed by Central Milk Producers Cooperative. All citations to the Appendix, *e.g.*, "App. A at 1", refer to that separately bound **Appendix.**

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Associated Milk Producers, Inc. and Mid-America Dairymen, Inc. pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit in *National Farmers' Organization, Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*).

OPINIONS BELOW

The four opinions[1] rendered by the courts below are reprinted in the Appendix and are officially reported as follows:

1. For convenience, each opinion will be referred to herein by its shorthand designation, *e.g.*, *"NFO IV,"* rather than by its full case name, followed by an official reporter citation and an Appendix citation when necessary.

National Farmers' Organization, Inc. v. Associated Milk Producers, Inc., 850 F.2d 1286 (8th Cir. 1988) (*"NFO IV"*), *reprinted in* App. B at 3. Review by writ of certiorari is sought as to this decision.

Alexander v. National Farmers Organization, 614 F. Supp. 745 (W.D. Mo. 1985) (*"NFO III"*), *reprinted in* App. E at 65.

Alexander v. National Farmers Organization, 687 F.2d 1173 (8th Cir. 1982) (*"NFO II"*), *cert. denied*, 461 U.S. 937 (1983), *reprinted in* App. F at 231.

In re Midwest Milk Monopolization Litigation, 510 F. Supp. 381 (W.D. Mo. 1981) (*"NFO I"*), *reprinted in* App. G at 297.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion and entered its judgment in *NFO IV* on July 5, 1988. Petitioners' timely Petition for Rehearing and Suggestions for Rehearing En Banc was denied on September 13, 1988. App. D at 63. Circuit Judges Bowman and Magill dissented from the denial of rehearing en banc. On December 3, 1988, Justice Blackmun granted petitioners an extension of time within which to file this Petition for Writ of Certiorari to and including January 26, 1989.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

Statutes[2]

Section 1 of the Sherman Act, 15 U.S.C. § 1.

Section 2 of the Sherman Act, 15 U.S.C. § 2.

Section 4 of the Clayton Act, 15 U.S.C. § 15.

Rules

Fed. R. Civ. P. 52(a) provides in pertinent part:

> In all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . . Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . It will be sufficient if the findings of fact and conclusions of law . . . appear in an opinion or memorandum of decision filed by the court. . . .

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2. The pertinent text of the statutes involved in this case is reprinted in App. A at 1.

STATEMENT OF THE CASE

Background—*NFO I* and *II*

This 17-year-old private antitrust litigation arose out of competition for dairy farmer membership between respondent National Farmers Organization ("NFO"), a national, non-profit collective bargaining association of farmers, and petitioners Mid-America Dairymen, Inc. ("Mid-Am"), Associated Milk Producers, Inc. ("AMPI"), and Central Milk Producers Cooperative ("CMPC"), all three of which are Capper-Volstead agricultural cooperative milk marketing associations.

NFO asserted claims against Mid-Am, AMPI, and CMPC under Sections 1 and 2 of the Sherman Act, alleging unlawful monopolization, attempted monopolization and conspiracy to monopolize, restrain trade, and eliminate NFO as a competitor in the marketing of raw Grade A milk in a ten-state midwestern region of the United States.[3] The District Court held that NFO had failed to present sufficient evidence to establish petitioners' liability and dismissed each of NFO's claims. *NFO I*, 510 F. Supp. at 502-03, App. G at 548-51.

On appeal the Eighth Circuit affirmed the District Court's dismissal of NFO's actual and attempted monopolization claims. *NFO II*, 687 F.2d at 1191-92, App. F at 256-59. With respect to the District Court's dismissal of NFO's Section 2 conspiracy claim, however, the Eighth Circuit reversed. The Eighth Circuit held that petitioners had conspired to monopolize and eliminate NFO as a competitor in the marketing of raw Grade A milk produced

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3. Jurisdiction in the District Court was based on 28 U.S.C. § 1337 and 15 U.S.C. §§ 15 and 26.

in a ten-state midwestern region and cited "examples of conduct" and "specific overt acts" directed against certain independent dairies in furtherance of the alleged conspiracy. 687 F.2d at 1193, 1196-1204, App. F at 261-62, 266-83. The Eighth Circuit also held, however, that many of the acts alleged by NFO to be unlawful were in fact lawful. 687 F.2d at 1195, 1199-1200, 1206-07, App. F at 264-65, 274-75, 287-89.

The Eighth Circuit observed that "[i]n light of its ruling as to liability, the district court did not decide any question of [NFO's] standing to recover damages, the appropriateness of particular damage theories, or the amount of any damages", and that absent relevant factual findings on these critical and complex issues, remand was necessary. 687 F.2d at 1208, App. F at 291. The Eighth Circuit noted that additional factual findings were required to assess NFO's damage theories and determine the amount of its damages, if any, attributable to petitioners' unlawful conduct and stated that those matters "largely raise factual questions for the district court" on remand. 687 F.2d at 1209, App. F at 294.

NFO III—Proceedings on Remand

On remand to the District Court, NFO declined the opportunity to reopen the record and present additional evidence to support its claim for damages, electing instead to rely on the evidence presented and the damage theories advanced at the original trial. NFO described its damage theories as the "test market" and "market structure"[4]

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4. The District Court's rejection of NFO's "market structure" damage theory was affirmed by the Eighth Circuit in *NFO IV*, 850 F.2d at 1292 & n.3, App. B at 11. Therefore, that damage theory will not be discussed further.

approaches, both of which attempted to estimate NFO's lost membership dues and checkoff (or marketing) fees under a "failure to grow" theory.

Under its "test market" theory, NFO sought to use its performance in an identifiable portion (Federal Milk Market Order 68, encompassing Minneapolis-St. Paul, Minnesota and several surrounding counties) of a ten-state geographic area as a "yardstick" to measure its performance in the remainder of the area (comprising nine of the twenty-seven federal milk market orders located in that geographic area). The "market" in which NFO sought damages, *i.e.*, the market for *members*, was not, however, the same market in which the Eighth Circuit found unlawful restraints, *i.e.*, the market for the *sale of raw Grade A milk*.

The validity of NFO's "test market" theory turned on the reasonableness and accuracy of its underlying factual assumptions and whether the relevant conditions in the other nine damage orders were sufficiently similar to the conditions in Order 68 such that NFO's performance in Order 68 could fairly be extrapolated to the other orders so as to provide a "just and reasonable estimate" of NFO's damages. *NFO IV*, 850 F.2d at 1294-95, App. B at 16-18.

NFO supported its "test market" damage theory primarily through the testimony of its expert economist and three of its employees. Several critical factual assumptions provided by NFO's counsel served as the foundation for its expert's testimony regarding damage projections in the ten federal milk market orders. In an exhaustive review and analysis of NFO's damage theory in light of the record evidence, the District Court rejected each of these assumptions as "untenable" and concluded that they were not supported by reasonable and credible facts and inferences

in the record. *NFO III*, 614 F. Supp. at 757-93, App. E at 82-154.

The District Court specifically found and concluded "that a just and reasonable estimate of NFO's alleged lost market penetration damages cannot be made on any credible relevant data adduced by NFO and that any award of damages based on such a theory would necessarily be based on speculation and conjecture." *NFO III*, 614 F. Supp. at 792-93, App. E at 153. The District Court also analyzed NFO's damage theory with respect to the specific overt acts directed against various independent dairies as described by the Eighth Circuit in *NFO II* and concluded that NFO's damage theory that it lost membership dues and checkoff fees as a result of those acts was untenable and was not supported by reasonable and credible facts and inferences in the record. *NFO III*, 614 F. Supp. at 793-99, App. E at 154-67. Accordingly, the District Court awarded no damages to NFO on its Section 2 conspiracy claim and entered judgment thereon in favor of petitioners.

NFO IV

On appeal the Eighth Circuit again reversed, holding that NFO's "test market" theory was "a proper basis for a substantial damage award." *NFO IV*, 850 F.2d at 1292, App. B at 11-12. The Eighth Circuit justified its reversal on the erroneous premise that the District Court had used an "inappropriate legal standard" in rejecting NFO's damage theory and evidence. 850 F.2d at 1292, App. B at 12.[5] Relying on four Supreme Court

5. Although the Eighth Circuit seemingly concluded that the District Court's findings "would be clearly erroneous", [*sic*] *NFO IV*, 850 F.2d at 1294, App. B at 16, nowhere in its opinion did the Eighth Circuit explain the basis for its rejection of the District Court's factual findings as "clearly erroneous".

decisions for the principle that the fact-finder may make a "just and reasonable estimate of the damage", the Eighth Circuit held that the District Court should have applied a "lesser standard of proof" in analyzing NFO's theory and evidence of the amount of its damages. 850 F.2d at 1293, App. B at 13.[6]

Rather than remanding the case to the District Court for reconsideration and new findings under this "lesser standard of proof", the Eighth Circuit reviewed the record *de novo*. The Eighth Circuit engaged in its own independent factual and legal analysis of NFO's "test market" damage theory and reversed, often without explanation, the District Court's factual findings, including its credibility determinations, with respect to the critical assumptions on which NFO's damage theory was based. 850 F.2d at 1294-1308, 1312-13, App. B at 16-47, 57-58. The Eighth Circuit stated that a "review of the record and our prior opinion" in *NFO II* left it "with the definite and firm conviction that the amount of damages suffered by NFO as a result of the illegal conspiracy was substantial" and that "[t]he record simply will not support a finding that NFO is entitled to only nominal damages."

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6. The Eighth Circuit reasoned that the District Court had improperly rejected NFO's damage evidence in its entirety because certain portions of it rested upon proposed findings which the District Court had rejected in *NFO I*, and that the District Court should have independently reexamined NFO's damage evidence "in light of the lesser standard of proof applicable to determining the amount of damages." *NFO IV*, 850 F.2d at 1294, App. B at 16.

An examination of the District Court's opinion in *NFO III* clearly shows that, contrary to the Eighth Circuit's unsupported statement, the District Court conscientiously applied the proper legal standard in evaluating NFO's damage evidence. *See, e.g., NFO III*, 614 F. Supp. at 778 n.26 (citing *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946)), 791-93, App. E at 125-26, 151-53.

850 F.2d at 1308, App. B at 47. The Eighth Circuit concluded that "NFO's damage evidence, while not perfect, clearly establishes the basis for a significant award." 850 F.2d at 1294, App. B at 16.

The Eighth Circuit remanded the action to the District Court "for computation of the amount of damages" with explicit directions that the District Court "shall accept the 'test market' theory propounded by NFO as a valid base from which to determine the amount of damages and shall use the $7,403,374 claimed under the theory as a starting point." 850 F.2d at 1312, App. B at 57. The court allowed for certain reductions from NFO's damage figure if on remand it was determined that such reductions were supported by the existing record. 850 F.2d at 1312-13, App. B at 57-58.

REASONS FOR GRANTING THE WRIT

This case presents an example of an appellate court's blatant disregard of the limited scope of review permitted under Federal Rule of Civil Procedure 52(a). It also gives this Court an opportunity to clarify for the lower federal courts the interplay between Rule 52(a) and a line of cases from this Court holding that the fact-finder is permitted to make a "just and reasonable estimate of the damage based on relevant data" and "to act upon probable and inferential, as well as direct and positive proof." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969).

The Eighth Circuit, in contrast to other Circuits, interprets this line of Supreme Court cases as allowing proof of the underlying evidentiary basis for the esti-

mate of antitrust damages by less than a "preponderance of the evidence." Its opinion suggests that this "lesser standard of proof" gives an appellate court more latitude than otherwise permitted under Rule 52(a) when reviewing a district court's findings regarding an antitrust plaintiff's proof of the amount of its damages.

The Eighth Circuit also interprets this line of cases as allowing an appellate court to shift to the defendant the burden of proof as to the quantum of damages and permitting an antitrust plaintiff to rely upon a damage theory that fails to exclude the effects of significant lawful competition and other lawful factors. If left to stand the Eighth Circuit's decision will encourage private antitrust litigation even though the plaintiff has no proof of actual measurable damages.

This Court should give plenary attention to the critical problems in the administration of private antitrust treble-damage claims that emerge from the Eighth Circuit's decision in this case.

I. THE EIGHTH CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH DECISIONS FROM OTHER CIRCUITS INTERPRETING SUPREME COURT DECISIONS REGARDING PROOF OF ANTITRUST DAMAGES AND CREATES CRITICAL PROBLEMS IN THE ADMINISTRATION OF ANTITRUST TREBLE-DAMAGE CLAIMS

A. The Eighth Circuit's Adoption of a "Lesser Standard of Proof"

The Eighth Circuit in *NFO IV* correctly stated that an antitrust plaintiff must prove: (1) that the defendant

violated the antitrust laws; (2) that the violation caused injury to the plaintiff; (3) that the injury was of a type sought to be prevented by the antitrust laws; and (4) the amount of the plaintiff's injury. The Eighth Circuit held that "[w]hile the first three of these elements must be established by a preponderance of the evidence, a lesser standard of proof is applicable to proof of the *amount* of damage." *NFO IV*, 850 F.2d at 1293, App. B at 13. The Eighth Circuit relied upon four decisions from this Court to support its adoption of this "lesser standard". *See J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); and *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931).

Fairly read, these decisions do not sanction proof of the underlying evidentiary basis for antitrust damage theories and estimates by less than a "preponderance of the evidence." They simply permit the fact-finder to make a "just and reasonable estimate of the damage based on relevant data" and "to act upon probable and inferential, as well as direct and positive proof." *Zenith Radio*, 395 U.S. at 124 (quoting *Story Parchment*, 282 U.S. at 564, and *Bigelow*, 327 U.S. at 264).

This Court was simply recognizing in those cases that the amount of an antitrust plaintiff's damages need not and often cannot be established with mathematical certainty or precision. The plaintiff still must present sufficient credible evidence, however, to enable the fact-finder to make a "just and reasonable estimate" of the actual damages sustained as a result of the antitrust violation. "Preponderance of the evidence" is the proper standard with respect to that underlying proof. *See J.*

Truett Payne, 451 U.S. at 568; *Zenith Radio*, 395 U.S. at 124; *see also Locklin v. Day-Glo Color Corp.*, 429 F.2d 873, 879 (7th Cir. 1970) (stating that an antitrust plaintiff "must prove the amount of damages by a preponderance of the evidence" and that "estimates based upon assumptions" must "rest upon an adequate base"), *cert. denied*, 400 U.S. 1020 (1971); *Bigelow v. RKO Radio Pictures, Inc.*, 150 F.2d 877, 883-84 (7th Cir. 1945) (stating that an antitrust verdict must be based "upon a preponderance of all the competent evidence" and that the amount of damages "may be reasonably approximated if based upon competent evidence"), *rev'd on other grounds*, 327 U.S. 251 (1946); *Garrett's v. Farah Manufacturing Co.*, 412 F. Supp. 656, 666 (D.S.C. 1976) (stating that the plaintiff "ha[s] the burden of proving by a preponderance of the evidence the amount of damages actually sustained as a result of the [antitrust] violation"); Fifth Circuit Pattern Jury Instructions, Civil Cases (1983) (stating that the fact-finder "should award an amount *shown by a preponderance of the evidence* in the case to be a just and reasonable sum sufficient to fairly and adequately compensate for the injury or damages sustained"), *reprinted in* 3 E. Devitt, C. Blackmar & M. Wolff, *Federal Jury Practice and Instructions* § 86.04, at 362 (4th ed. 1987) (emphasis added). The Fifth Circuit's Pattern Jury Instruction correctly recognizes that while the legal standard applied to the amount of damages is a "just and reasonable" estimate, the standard applied to the underlying evidentiary proof on which that estimate is based is a "preponderance of the evidence". The Eighth Circuit failed to recognize this distinction in *NFO IV*.

The Eighth Circuit's adoption of this "lesser standard" of proof permits an appellate court to usurp the function

of the fact-finder in violation of the commands of Rule 52(a). Even if an antitrust plaintiff's damage theory is rejected by the fact-finder because it is based upon inadequately supported factual assumptions and discredited testimony, the appellate court can apply the vague "lesser standard" and substitute its own contrary conclusions and inferences from a cold record. This "lesser standard", as evidenced by its application here, permits an appellate court to award substantial antitrust damages based solely upon its finding of an antitrust violation. *NFO IV*, 850 F.2d at 1293-94, App. B at 15-16. Such a result-oriented approach is contrary to the well-established antitrust principle that an antitrust violation alone does not mandate an award of substantial damages. *See J. Truett Payne*, 451 U.S. at 562; *Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 486 (1977); *Gray v. Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

The Eighth Circuit's novel interpretation of this Court's decisions in *Story Parchment, Bigelow, Zenith Radio* and *J. Truett Payne* adds to the already significant confusion and uncertainty in the lower federal courts regarding the appropriate standard for proof of the amount of an antitrust plaintiff's damages. If left to stand, it will encourage the proliferation of private antitrust litigation and authorize substantial treble-damage awards in cases where, as here, there is no credible proof of actual, measurable damages. This case presents an excellent opportunity for this Court to resolve the split of authority in the Circuits and to clear up the confusion generated by this Court's prior decisions regarding the legal standards to be applied to an antitrust plaintiff's proof of the amount of its damages.

B. The Eighth Circuit's Shifting of the Burden of Proof

Presented with NFO's refusal on remand in *NFO III* to present additional evidence in order to provide the fact-finder a reasonable basis on which to estimate its alleged losses, the Eighth Circuit, relying upon its new "lesser standard of proof," simply shifted to petitioners the burden of proof on the amount of NFO's damages. The Eighth Circuit suggested that petitioners, as the defendants, should have presented evidence of a proper "yardstick" for measuring the amount of damages in order to remedy NFO's defective damage theory and evidence. *See, e.g., NFO IV*, 850 F.2d at 1296-97, 1301, App. B at 20-21, 32. In support of its holding the Eighth Circuit again relied upon this Court's decisions in *J. Truett Payne, Zenith Radio, Bigelow,* and *Story Parchment* for the proposition that petitioners had to bear the risk of uncertainty involved in NFO's damage theory.

Other Circuits, also relying on *Bigelow,* have rejected the notion that the uncertainty of the plaintiff's damages justifies a shifting of the burden of proof to the defendant. *See, e.g., Wells Real Estate, Inc. v. Greater Lowell Board of Realtors,* 850 F.2d 803, 816 (1st Cir.) (stating that "[a]lthough a private antitrust litigant is not required to prove the amount of its damages with mathematical certainty . . ., this guiding principle does not shift the burden of proof"), *cert. denied,* 109 S. Ct. 392 (1988); *Locklin v. Day-Glo Color Corp.,* 429 F.2d 873, 879 (7th Cir. 1970). There is an apparent split in the Circuits on this issue, however, as some courts have suggested that the burden of proof does shift to the defendant. *Cf. D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.,* 692 F.2d 1245,

1249 (9th Cir. 1982); *Klinger v. Baltimore & Ohio Railroad*, 432 F.2d 506, 516 (2d Cir. 1970).[7]

Review by this Court is necessary to resolve the confusion and apparent split of authority among the Circuits regarding the proper allocation of the burden of proof on the amount of an antitrust plaintiff's damages.

C. The Eighth Circuit's Acceptance of a Damage Theory That Failed to Account for the Effects of Lawful Factors

This case presents an important question regarding the proper interpretation of Section 4 of the Clayton Act, 15 U.S.C. § 15, and the necessary elements of an antitrust damage theory to support an award of substantial damages. Section 4 of the Clayton Act permits recovery for actual damages or injury "by reason of anything forbidden in the antitrust laws," but does not permit recovery for economic injury resulting from lawful conduct or causes not attributable to an antitrust violation.

The Eighth Circuit in *NFO IV* again relied upon the "just and reasonable" language in this Court's prior cases to hold that NFO's damage theory was not impermissibly

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7. The Eighth Circuit's shifting of the burden in *NFO IV* is inconsistent with its prior decision in *NFO II*, wherein it repeatedly emphasized NFO's burden on remand to prove its damage theory. *See, e.g., NFO II* at 1196 n.21, 1203 n.35, 1206-07, 1208, 1209 n.42, 1210, App. F at 37, 51, 58-59, 62-65. Moreover, the Eighth Circuit's shifting of the burden to defendants is fundamentally unfair in the circumstances of this case and mandates an impossible task on remand. Defendants now apparently must attempt to correct NFO's flawed damage theory on the *existing* record. NFO was afforded an opportunity on remand to the District Court in *NFO III* to reopen the record, but expressly declined to do so. Defendants, unaware that the Eighth Circuit would subsequently shift the burden to them, have been deprived of the opportunity to present additional evidence.

flawed simply because of its failure to account for lawful competition. *NFO IV*, 850 F.2d at 1305-08, App. B at 42-47.[8] The Eighth Circuit's holding conflicts with decisions of this Court and of other Circuits, and, if allowed to stand, would establish a dangerous precedent under which defendants would be required to pay substantial treble damages for completely lawful conduct.

This Court has held that antitrust damages cannot be based upon "speculation and guesswork", *Bigelow*, 327 U.S. at 264, and that a fact-finder may award damages only to the extent those damages are caused by defendants' wrongful acts and are "not shown to be attributable to other causes", *J. Truett Payne*, 451 U.S. at 566 (quoting *Bigelow*).

In contrast to the Eighth Circuit, the Second, Third, Fourth, and Ninth Circuits, also applying the *Bigelow* line of cases, uniformly have held that an antitrust damage theory that fails to take into account the effects of lawful competition is speculative as a matter of law and cannot form the basis of a "just and reasonable estimate" of damages. For example, in *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983), the Seventh Circuit determined that some of the acts for which the plaintiff sought to recover damages were law-

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8. Throughout this litigation NFO assumed, as part of its damage theories, that virtually every activity undertaken by defendants since the early 1960s was unlawful. Both the District Court and the Eighth Circuit held, however, that many of the challenged activities were entirely lawful. *See NFO II*, 687 F.2d at 1195, 1199-1200, 1206-07, App. F at 264-65, 274-75, 288-89; *NFO IV*, 850 F.2d at 1306 n.44, App. B at 43. NFO refused the opportunity to present additional evidence on remand to allow the District Court to adjust its damage theories and calculations to account for the effects of that lawful conduct.

ful. Because the plaintiff's evidence did not afford any basis for apportioning plaintiff's alleged losses between the lawful and unlawful acts, however, the Seventh Circuit reversed the district court's award of substantial damages, stating:

> When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit [the fact-finder] to make a reasonable and principled estimate of the amount of damage. This is precisely the type of "speculation or guesswork" not permitted for antitrust injury verdicts. To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.

708 F.2d at 1162-63 (citing *Bigelow*); *see also United States Football League v. National Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1352-53 (3d Cir. 1975); *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1043-45 (4th Cir. 1987), *cert. denied*, 108 S. Ct. 1753 (1988); *Farley Transportation Co. v. Santa Fe Trail Transportation Co.*, 786 F.2d 1342, 1350-52 (9th Cir. 1985); *accord ILC Peripherals Leasing Corp. v. IBM Corp.*, 458 F. Supp. 423, 435-36 (N.D. Cal. 1978), *aff'd sub nom. Memorex Corp. v. IBM Corp.*, 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981).

The rationale of these cases is sound. Section 4 of the Clayton Act permits recovery only for losses directly attributable to a defendant's unlawful conduct. *See J. Truett Payne*, 451 U.S. at 566. A damage theory that

attributes all of the plaintiff's alleged losses to all of the defendants' acts, as NFO's did here, despite the presence of substantial lawful competition and other lawful causes and factors not attributable to the antitrust violation, cannot as a matter of law form the basis of a reasonable and principled estimate of damages.[9] An appellate decision which permits such a damage theory to form the predicate for a potential multi-million dollar damage award turns the competition policy of the antitrust laws upside down and improperly compensates a plaintiff for what was in fact lawful competition.

II. THE EIGHTH CIRCUIT'S DECISION RAISES AN IMPORTANT QUESTION WHETHER AN APPELLATE COURT'S REVIEW OF A DISTRICT COURT'S ANTITRUST DAMAGE FINDINGS IS IMMUNE FROM THE COMMANDS OF RULE 52(a)

The Eighth Circuit totally ignored the District Court's extensive findings supporting its conclusion that there is no "credible" evidence that NFO suffered any injury entitling it to treble damages. As in *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709, 713 (1986), "nowhere in its opinion did the [Eighth Circuit] ever mention any of the factual findings of the district court, much less discuss or analyze them." Instead, the Eighth Circuit improperly reviewed the record independently and engaged in its own fact-finding in order to reach its own foregone conclusion that NFO's evidence "clearly estab-

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9. The issue is not simply one of damage measurement, as the Eighth Circuit suggested, but rather goes to the fundamental element of causation, inasmuch as losses resulting from lawful competition are not the type of antitrust injury for which recovery is permitted under § 4 of the Clayton Act. *See Brunswick Corp. v. Pueblo Bowl-o-Mat, Inc.*, 429 U.S. 477, 489 (1977); *see also MCI*, 708 F.2d at 1161.

lishes the basis for a significant award." *NFO IV*, 850 F.2d at 1294, App. B at 16. Such appellate fact-finding conflicts with the plain language of Rule 52(a) and with this Court's decisions interpreting Rule 52(a) and clarifying the scope of appellate review thereunder.

Rule 52(a) provides that a district court's "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses." In *NFO IV* the Eighth Circuit does not even mention Rule 52(a), much less attempt to comply with its commands.[10] Indeed, the Eighth Circuit blatantly violated the commands of Rule 52(a), as articulated by this Court in *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-75 (1985), in many critical respects. Here we note four of the more egregious examples:

1. The District Court found that Order 68 was not sufficiently comparable to the other damage orders to justify its use as a "yardstick" measure of NFO's performance. *NFO III*, 614 F. Supp. at 791, App. E at 151. The Eighth Circuit conceded that "NFO's yardstick measurement is not perfect", that "[t]he record contains evidence that [Order 68] was unique in several respects", and that there were "troublesome" differences between Order 68 and the other damage orders. *NFO IV*, 850 F.2d at 1295-96, App. B at 19-20. The Eighth Circuit, however,

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10. At one point in its opinion, the Eighth Circuit stated that "in light of our prior opinion [in *NFO II*] and the damage evidence adduced by the parties," the district court's finding that NFO offered insufficient proof to recover any damages "would be clearly erroneous." *NFO IV*, 850 F.2d at 1294, App. B at 16. If the Eighth Circuit intended that cryptic remark as a reference to the "clearly erroneous" standard of Rule 52(a), the reference is misplaced. It takes more than a prior appellate opinion or "evidence adduced by the parties" to make a district court's factual findings "clearly erroneous" within the meaning of Rule 52(a).

simply ignored the District Court's exhaustive and well-reasoned factual analysis for rejecting Order 68 as an appropriate "yardstick" and substituted its own judgment and version of the facts for that of the District Court.

2. The District Court expressly rejected NFO's proposed finding of fact and exhibit with respect to NFO's critical assumption of the number of NFO dairy farmers. The District Court found no credible factual support for NFO's assumption because NFO had no actual data to show the number of NFO dairy members in any state. *NFO III*, 614 F. Supp. at 763-65, App. E at 93-98. The Eighth Circuit simply ignored the District Court's findings and summarily concluded that under its "lesser standard of proof" NFO's use of these unsupported factual assumptions and the process by which NFO calculated its lost membership dues were "just and reasonable". *NFO IV*, 850 F.2d at 1301, App. B at 32.

3. The District Court rejected several of NFO's proposed factual findings and exhibits proffered to support NFO's allegation that Order 68 was a proper "yardstick" for measuring its damages because of its strong membership base on Order 68 and in the midwest generally. To support its contrary factual findings, the Eighth Circuit relied upon the direct testimony of three NFO employees without acknowledging that the District Court had rejected their self-serving testimony for lack of credibility.[11] *See NFO IV*, 850 F.2d at 1296 n.15, App. B at 22;

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11. With respect to another NFO assumption—that NFO would have entered all ten damage orders at staggered times within three years—the Eighth Circuit again relied upon the self-serving and unsupported testimony of these three NFO employees without acknowledging that their testimony had been rejected as not credible by the District Court. *NFO IV*, 850 F.2d at 1301-02, App. B at 33-34.

compare NFO III, 614 F. Supp. at 763-65, App. E at 93-98. The Eighth Circuit cited no extrinsic evidence to support its contrary factual findings on this point.[12]

4. The Eighth Circuit found "reasonable" NFO's "assumption" that it would achieve its alleged mature market share (10.5%) within three years. *NFO IV*, 850 F.2d at 1302, App. B at 34-35. The District Court, however, had rejected such an assumption, as well as NFO's expert's corollary assumption that market conditions would remain static, for lack of credible factual support and instead had credited the testimony of petitioners' expert on this issue. *NFO III*, 614 F. Supp. at 784-90, App. E at 137-150. The Eighth Circuit opined that the District Court's analysis on this issue was "flawed," and suggested that the District Court on remand could simply adjust NFO's damage theory calculation rather than rejecting it as speculative.

In setting aside these and other pivotal factual findings by the District Court, the Eighth Circuit blatantly exceeded the permissible scope of appellate review under Rule 52(a)'s "clearly erroneous" standard and ignored the commands of this Court that: (1) "appellate courts must constantly have in mind that their function is not to decide factual issues de novo"; (2) a district court's

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12. The factual assumptions discussed in paragraphs 2 and 3 above were critical to NFO's damage calculation under its "test market" theory. NFO's expert testified that the "most important" factor that he took into account to support his opinions regarding NFO's capability in the various market orders was NFO's assumed membership base in the various damage markets. *See NFO III*, 614 F. Supp. at 778, App. E at 125. The District Court found that NFO was unable to adduce any credible evidence regarding either its membership base in general or the number of dairy farmers who were active NFO members at any particular time. 614 F. Supp. at 764-65, 778, App. E at 94-98, 125.

findings cannot be set aside if they are "plausible in light of the record viewed in its entirety"; (3) a court of appeals may not reverse "even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently"; (4) "[w]here there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous"; and (5) an appellate court must give "even greater deference" to the district court's credibility determinations. *See Bessemer City,* 470 U.S. at 573-75.

The Eighth Circuit engaged in its own *de novo* review and fact-finding because in its view the District Court's findings were "tainted" by its failure to independently review NFO's damage evidence in light of the Eighth Circuit's "lesser [than preponderance of the evidence] standard of proof applicable to the amount of damages." *NFO IV,* 850 F.2d at 1294, App. B at 16.[13] Based upon its application of this "lesser standard of proof", the Eighth Circuit carved out an exception to the strictures of Rule 52(a) for findings regarding an antitrust plaintiff's proof of damages.

There is no precedent in this Court or in any other Circuit for the Eighth Circuit's "antitrust damages" exception to Rule 52(a). Indeed, such an exception conflicts with this Court's statement in *Pullman-Standard v. Swint,* 456 U.S. 273, 287 (1982), that Rule 52(a) "does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous" and with this Court's application of

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13. The Eighth Circuit's remedy was not a remand to the District Court to reconsider and make new findings in light of this standard, but rather to make its own appellate findings.

Rule 52(a) to a district court's findings regarding antitrust damage proof in *Zenith Radio*, 395 U.S. at 123-25.

Left unreviewed, the Eighth Circuit's decision in *NFO IV* would establish a confusing and dangerous precedent and create an "antitrust damages" exception to Rule 52(a) where none existed before. Review is necessary to reaffirm that Rule 52(a) applies to a district court's findings on all issues and in all cases.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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